Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ANTHONY SPERO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOHN W. MITCHELL
(Counsel of Record)
600 Third Avenue, 31st Floor
New York, New York 10016
(212) 696-9500

Attorney for Petitioner
Anthony Spero

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QUESTION PRESENTED FOR REVIEW

Whether the Second Circuit Court Of Appeals was wrong in failing to notice, as either "plain error" or "structural error," the fact that the Government's proof at trial had caused a "constructive amendment" of the Indictment and a "*per se*" violation of the Fifth Amendment of the United States Constitution.

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Appendix A — Opinion of the United States Court Of Appeals For The Second Circuit Dated and Decided May 20, 2003. . . . . 1a

PETITION FOR A WRIT OF CERTIORARI

Petitioner Anthony Spero, respectfully petitions for Writ of Certiorari to review the Judgement of the United States Court Of Appeals For The Second Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals was originally issued as a "Summary Order," pursuant to Rule 0.23 of the Local Rules Of The Second Circuit Court of Appeals (see, *United States v. Spero*, 2003 U.S. App. LEXIS 3755). On May 20, 2003, it was published as an official opinion of the Court and is reported as *United States v. Spero*, ___ F.3d ___, 2003 U.S. App. LEXIS 9640. (1a -)

STATEMENT OF JURISDICTION

The Judgement of the Court of Appeals for the Second Circuit was entered on February 28, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that: "[N]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...[and that] [n]o person shall be deprived of life, liberty, or property, without due process of law..."

The Sixth Amendment to the United States Constitution provides in relevant part that: "In all criminal prosecutions, the accused shall... have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

Following a trial before a jury in the United States District Court for the Eastern District of New York the Petitioner, Anthony Spero, was found guilty of one count of 18 U.S.C. §1962(d), Conspiracy To Violate 18 U.S.C. §1962(c). On April 15, 2002, the defendant was sentenced to life imprisonment, five years supervised release and a $250,000 fine. Restitution was ordered in the amount of $7,477.00 and a special assessment of $100 was imposed.

Petitioner was tried on a single count indictment that alleged a RICO conspiracy to conduct the affairs of an enterprise through a pattern of racketeering activity in violation of 18 U.S.C. §1962(c), all in violation of 18 U.S.C. §1962(d). The enterprise was alleged to be an association-in-fact made up of individuals said to be members and associates of the so-called Bonanno Organized Crime Family. The Indictment further alleged that the pattern of racketeering activity through which the defendant agreed and conspired to conduct the affairs of the enterprise consisted of five specifically enumerated racketeering acts.

On appeal to the Second Circuit, the Petitioner argued that the statute of limitations[1] had expired prior to the commencement of Petitioner's prosecution and that the Government had failed to offer proof at the trial that RICO conspiracy charged, continued after May 25, 1994 (which marked the date five years from day that the Indictment under which the Petitioner was prosecuted, had been returned).

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[1] See *18 U.S.C. § 3282;* "No person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found . . . within five years next after such offense shall have been committed."

The Petitioner asserted on appeal that although a RICO conspiracy is a "common law" conspiracy and therefore that the statute of limitations will not be deemed to have run until the goals of the conspiracy are either accomplished or abandoned, that a RICO conspiracy is however, at least in one important respect, a hybrid form of common law conspiracy. That is to say, that a RICO conspiracy is required by statute to be a conspiracy to conduct the affairs of an enterprise through the pattern of racketeering acts alleged in the indictment. Perforce, a RICO conspiracy - by din of statute - is limited to a conspiracy to conduct the affairs of an enterprise through a specific set (or "pattern") of acts. Conversely, it is not a conspiracy to conduct the affairs of an enterprise generally through criminal activity (even if such activity might include the commission of racketeering acts). The conspiracy must be to conduct the affairs of a particular enterprise through the specific "pattern" of racketeering acts charged in the indictment, and no others.

Petitioner pointed out to the Court below that the "pattern of racketeering" charged in the Indictment consisted of five separate "racketeering acts." These included, Racketeering Act #1, which charged Petitioner with a conspiracy to make and collect extortionate extensions of credit between January 1983 and May 1999. Racketeering Act #2, which charged the defendant with participation in an "illegal gambling business" in violation of 18 U.S.C. §1955 and which was alleged to have begun on or about August 1988 and to have been concluded in or about December of 1993. (Ind., p.7, ¶ 19) Racketeering Act #3, which charged the murder and conspiracy to murder an individual by the name of Louis Tuzzio, was complete on January 3, 1990. (Ind., pp. 6-7, ¶¶ 22 & 22). Racketeering Act #4, which alleged the conspiracy to murder an individual by the name of Vincent Bickelman, was complete on September 15, 1991. (Ind., p.8, ¶¶ 24 & 25). And Racketeering Act #5, which charged the murder and conspiracy to murder an individual by

the name of Paul Gulino, was complete in July 1993 (Ind., pp. 9-10, ¶¶ 27 & 28).

Following the trial, Petitioner filed a motion pursuant to Rule 29(c) of the Fed. R. Crim. Pro., challenging the timeliness of the prosecution. During oral argument on the motion before the Trial Court (Korman, J.), the government conceded that the various acts and activities that made up the five racketeering acts constituting the "pattern of racketeering activity" charged, were indeed complete more than five years before the indictment had been brought. As the prosecutor acknowledged:

> AUSA WALDEN: Well, in terms of the proof at trial, Judge, the last predicate act was September 25, 1993... And so for the purposes of discussion, **I think that we should assume that the last racketeering act occurred with the Paul Gulino murder which was September 25, 1993 and the indictment was in 1999, in May of 1999, so it was just a little bit longer than -- or it was longer than five years, rather, not quite six**. (emphasis supplied, Tr. of 12/14/2001 at pg. 9)

The Rule 29 motion to the trial court was denied without opinion and an appeal to the Second Circuit Court of Appeals followed. In defense of the Petitioner's assertion to the appellate court that the prosecution had been untimely, the government's response was quite remarkable. Indeed, on appeal the government espoused the radical view that it had not been restricted in its trial proof to only establishing that the defendant had conspired to conduct the affairs of the enterprise by the acts charged in the pattern of racketeering activity, but could and did, in the course of its prosecution, prove racketeering acts beyond those alleged in the "pattern." In support of their purported right to offer such proof, the government erroneously asserted that so long as the Petitioner remained a member of the enterprise, that racketeering acts not

alleged by the grand jury to have been part of the "pattern of racketeering activity," were nonetheless admissible in its case in chief; and not merely to show "continuity" or the nature of the enterprise, but as substantiative proof of the RICO conspiracy itself. In furtherance of this mistaken view of the parameters of a RICO conspiracy unit of prosecution, the government represented in this its brief on appeal that it had proved that the RICO conspiracy had continued past May of 1994 by relying on a series of acts that were proved at trial but were not alleged to be part of the "pattern" charged. As the government explained its position in its brief before the Second Circuit Court of Appeals:

> Spero contends, however, that this evidence was insufficient to satisfy the statute of limitations. He asserts that the appropriate test should look to 'whether the defendant continued to conspire to conduct the affairs of the enterprise through the specific pattern of racketeering activity alleged in the indictment.' (Br. 20). **According to Spero, the scope of a RICO conspiracy 'is defined by the contours of the underlying target RICO substantive offense' and is limited to 'an agreement to conduct the affairs of the enterprise through the specific pattern of racketeering activity (and no other racketeering acts).' (Br. 26). Spero's argument is wrong...**
>
> * * *
>
> [T]o the extent that affirmative proof of ongoing criminal conduct is used to show the continued existence of a RICO conspiracy, **the government may rely upon acts that were not charged in the indictment**...Thus, to satisfy the statute of limitations in this case, **the government may rely upon**

> **uncharged acts committed in furtherance of the conspiracy, such as obstruction of justice, that occurred after May, 1994.** (Government's Brief at pg. 31, emphasis supplied)

Mistakenly believing that it was not limited in its proof of the RICO conspiracy by the "pattern of racketeering" which had been charged in the Indictment, the government conceded for the first time in its brief on appeal, that it had proved additional and separate racketeering acts, beyond those in the "pattern." In fact, the government went on to represent that it had proved at trial at least four different (and additional) series of uncharged racketeering acts, all of which had taken place after May of 1994, and argued therefore, that the trial proof showed that the RICO conspiracy prosecution was timely brought.

Exacerbating the situation further, even though the Petitioner was not individually involved in any of these uncharged racketeering acts, the prosecution claimed that they were nonetheless properly admitted against him because such acts were purportedly committed by his "co-conspirators." In this regard, the government erroneously believed that any person alleged to be a member of the same enterprise was, *ipso facto*, a RICO "co-conspirator" of the Petitioner. Moreover, the government made this claim even though none of these individuals were ever named in the Indictment, otherwise identified by the grand jury, nor did the government ever issue a bill of particulars naming them as co-conspirators.

Pointing out that the Government had conceded for the first time in its brief on appeal that it had proven uncharged racketeering acts at the trial, the Petitioner in his reply brief argued that by doing so, the government had conceded the "constructive amendment" of the indictment by the trial proof.

And, the government did not argue otherwise, since it believed it was allowed to offer this other racketeering act

proof, even though it was not charged as any part of the "pattern" alleged in the Indictment. However, because the law of the Second Circuit was well settled that proof of racketeering acts not alleged to be part of the "pattern" constituted a "constructive amendment" of a RICO indictment,[2] Petitioner's counsel argued vigorously at oral argument that reversal was mandated, indeed that it was a *per se* rule in the Circuit that a constructive amendment of an indictment by the trial proof, required the case be reversed.

Nevertheless, the Second Circuit affirmed Petitioner's conviction. The Court held: "[While it] is uncontested that Racketeering Acts # 2-5 charged in the indictment (which acts consist of three murders and conspiracy to participate in an illegal gambling enterprise) were all completed by the end of 1993... Spero has failed to rebut the presumption that the loansharking conspiracy charged in Racketeering Act # 1 continued past May 25, 1994. Accordingly, Spero's prosecution was timely because Racketeering Act # 1 is presumed to have continued past May 25, 1994."

In affirming the Petitioner's conviction, the Court of Appeals ignored the government's concession (indeed, never mentioned it), that it had not offered any proof to show that any of the "charged" racketeering acts, took place or continued after May of 1994. The Court further ignored the fact that even if the loansharking activity (alleged in Racketeering Act #1) was "presumed" to continue into the limitation period, as soon as the other racketeering acts were complete, the RICO conspiracy necessarily ceased, since the affairs of the enterprise were no longer (could no longer) be "conducted" through a "pattern" of racketeering activity, since a pattern, *inter alia*, must consist of at least two racketeering acts.

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[2] *See, United States v. Zingaro, 858 F.2d 94, 98 (2d Cir. 1988).*

Even more troubling, was the fact that the Court of Appeals simply disregarded the extraordinary concession from the government that they had offered proof of uncharged racketeering acts (and thereby "constructively amended" the indictment) during the trial. Regrettably, the Court relegated the entire matter to a footnote,[3] writing only that: "In his reply brief, Spero also asserts that the Government engaged in a 'constructive amendment' of the indictment of this case, which is a per se violation of the Fifth Amendment, requiring reversal of the conviction. Because this claim was not raised in the District Court or in defendant's main appellate brief, and because no plain error is apparent, we will not consider that claim. See, e.g., *O'Hara v. Weeks Marine, Inc., 294 F.3d 55, 67 n.5 (2d Cir. 2002).*"

It is respectfully asserted that the Court of Appeals had no justification for refusing to notice the error presented by the government's constructive amendment of the indictment. The error was "plain error," if not error of the magnitude of "structural error" and to affirm Petitioner's conviction, and thereby commit a man to prison for the rest of his natural life, based upon a trial where error of this magnitude occurred, is antithetical to the principals of fairness that this Republic and our Constitution were founded upon.

Most respectfully, this Court should grant certiorari in this case not only to redress the indisputable violation of the Petitioner's constitutional rights which occurred below, but also

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[3] Moreover, the Second Circuit originally issued its decision as a unpublished "Summary Order," pursuant to Rule 0.23 of the Local Rules Of The Second Circuit Court of Appeals.(see, 2003 U.S. App. LEXIS 3755). It was only after the government subsequently moved to have the Circuit Court "publish" the opinion, that the Court agreed to do so.

to clarify the existing law of the circuit courts of appeals with regard to the proper treatment of "constructive amendment"error in following this Court's opinions in *Olano*, *Johnson* and *Cotton*.[4]

REASONS FOR GRANTING THE PETITION

"When the government, through its presentation of evidence and/or its argument . . . broadens the bases of conviction beyond those charged in the indictment, a constructive amendment -- sometimes referred to as a fatal variance -- occurs." *United States v. Randall, 171 F.3d 195, 203 (4th Cir. 1999).* Under prevailing law, a "constructive amendment" of a RICO indictment will be deemed to occur when the prosecution offers as affirmative proof, racketeering acts not charged as part of the "pattern of racketeering activity" set forth in the indictment. *See, United States v. Zingaro, supra. at, 98 (2d Cir. 1988).* "The introduction of evidence concerning that loan impermissibly broadened the charges against *Zingaro*, resulting in a constructive amendment of the indictment requiring reversal."(*Id.* at 104) "[C]onstructive amendments of an indictment are *per se* violations of the Fifth Amendment that require reversal even without a showing of prejudice." Accord, *United States v. Delano, supra, at 739. Accord, United States v. Roshko, 969 F.2d 1, 4-7 (2d Cir. 1992); United States v. Mollica, 849 F.2d 723, 729-730 (2d Cir. 1988); United States v. Clemente, 22 F.3d 477, 482 (2d Cir. 1994).*

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[4] See, *United States v. Olano, 507 U.S. 725 (1993); Johnson v. United States, 520 U.S. 46 (1997); United States v. Cotton, 535 U.S. 625 (2002).*

Even though, at the time of the decision by the court below, it was the settled law of the Second Circuit that constructive amendments were deemed *per se* violations requiring reversal without a showing of prejudice, the Court nonetheless refused to notice the constructive amendment of Petitioner's Indictment as either "plain error," or "structural error." Instead, as indicated previously, the Court relegated the entire issue to a brief statement in a footnote, asserting: "Because this claim was not raised in the District Court or in defendant's main appellate brief, and because no plain error is apparent, we will not consider that claim."

Moreover, in support of these contentions the Court cited a single civil case; *O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55, 67 n.5 (2d Cir. 2002).

The Second Circuit's treatment of the constructive amendment issue in this manner, and the meager explanation for such treatment, was entirely unwarranted. Indeed, several observations can be made in this regard. As an initial proposition, the Court of Appeal's reliance on a civil case, *O'Hara v. Weeks Marine, Inc., supra*, to support the proposition that the error should not have been noticed, is itself inexplicable. While the case is obviously referenced to purportedly support the contention that the issue was not properly preserved for review, it cannot be read as authority for that proposition for a number of reasons.

First, the plain error rule and the concomitant issue of preservation for review, are applied entirely differently in civil cases than they are in criminal cases. In fact, many circuits believe that the doctrine of "plain error review" is never applicable to a civil case. In at least two Circuits, the suggestion that the court is empowered to conduct "plain error" review in civil cases, has been rejected out of hand (See, *Sussman v. Unum Provident Corporation*, ___ F.3d ___, 2003 U.S. App. LEXIS 8625 (9th Cir. 2003) ["This court has long enjoyed the 'reputation as the strictest enforcer of *Rule 51*,' as

we have consistently declared that there is no 'plain error' exception in civil cases in this circuit. *Voohries-Larson v. Cessna Aircraft Co., 241 F.3d 707, 713 (9th Cir. 2001)* (quoting *Hammer v. Gross, 932 F.2d 842, 847 (9th Cir. 1991)* (en banc);" *Crabtree v. National Steel Corporation*, 261 F.3d 715 (7th Cir. 2001); *Achor v. Riverside Golf Club, 117 F.3d 339 (7th Cir. 1997); Deppe v. Tripp, 863 F.2d 1356, 1361 (7th Cir. 1988);* Wright & A. Miller, Federal Practice and Procedure § 2558, pp. 462-469 n.14 (1994).

In the Second Circuit, "plain error review" is invoked in civil appeals only under the most limited of circumstances - and as the Court has held on a number of occasions - the scope of "plain error review" in a civil case is materially different from and markedly narrower than, "plain error review" in criminal cases. See, *Taylor v. Vermont Department of Education, 313 F.3d 768, 795 (2d. Cir. 2002)* " In the civil context, however, we reverse only if there has been fundamental error. '**Fundamental error is more egregious than the 'plain' error that can excuse a procedural default in a criminal trial, and is so serious and flagrant that it goes to the very integrity of the [proceeding]**.' Jarvis v. Ford Motor Co., 283 F.3d 33, 62 (2d Cir. 2002); see also, *Shade v. Hous. Auth. of City of New Haven, 251 F.3d 307, 313 (2d Cir. 2001)* **[noting that fundamental error is narrower than plain error doctrine]** (emphasis supplied)

Second, and perhaps an even more compelling argument as to why the Circuit Court's reliance upon a civil case to assess whether the constructive amendment error should have been noticed in this case was entirely misplaced, is that it is indisputable that it is never too late to raise a matter of "plain error" (i.e., Rule 52[b] error) in a criminal case. Axiomatically, the "plain error" Rule is expressly designed to apply when the error has not been preserved (otherwise the "harmless error" rule applies). As the Second Circuit itself explained in *United States v. Gore, 154 F.3d 34, 42 (2d. Cir 1998)*: "Rule 52(b)

provides: 'Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.'"

In fact, this Court on a number of occasions, has noticed error, *sua sponte*, that was neither raised in the District Court, the Court of Appeals nor in the petition itself. As the Court explained in *Silber v. United States, 370 U.S. 717; 82 S. Ct. 1287 (1962)*: "The Court has 'the power to notice a plain error though it is not assigned or specified,' 'In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.' *United States v. Atkinson, 297 U.S. 157, 160.* Our own rules provide that 'the court, at its option, may notice a plain error not presented.' Revised Rules of the Supreme Court of the United States, Rule 40(1)(d)(2). See also Fed. Rules Crim. Proc. 52 (b)."Accord, *United Brotherhood of Carpenters and Joiners of America v. United States, 330 U.S. 395 (1947).*

Another inexplicable aspect of the manner that the Second Circuit treated the constructive amendment issue in this case, is that in failing to find that it constituted "plain error," the Court - without explanation - departed from what was otherwise the settled law of the Circuit. Indeed, it has long been *stare decisis* in the Second Circuit that a constructive amendment of an indictment constituted a *per se* violation of the Fifth Amendment and required reversal even in the absence of any showing of prejudice. In the seminal case in the Second Circuit on the issue of the constructive amendment of a RICO conspiracy indictment - *United States v. Zingaro* - the Court held that reversal was required even though the appellant had conceded on appeal that he had suffered no demonstrable prejudice by the introduction of evidence of additional racketeering activity (that is to say, racketeering activity

beyond that charged in the "pattern of racketeering activity" in the indictment). *To wit;* "Zingaro frankly concedes that he was not prejudiced by any lack of notice that the government intended to use evidence of the 'George the Greek' loan at trial. [Nevertheless] it is well settled that the constructive amendment of an indictment is per se volatile of the grand jury clause of the fifth amendment."(*Id.* at 98) Accord, *United States v. Mollica, supra. at 729 (2d Cir. 1988).* "A constructive amendment of an indictment is a per se violation of the Grand Jury Clause of the Fifth Amendment 'that requires reversal even without a showing of prejudice to the defendant;'" *United States v. Roshko, supra. at 5 (2d. Cir. 1992)* "Since the constructive amendment, or broadening, of the charging instrument at trial 'destroys the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury,' *Stirone, 361 U.S. at 217,* it 'is a per se violation of the grand jury clause of the Fifth Amendment' where such amendment affects 'an essential element of the offense;'" *United States v. Dhinsa, 243 F.3d 635, 667-669(2d. Cir 2001);* *United States v. Wozniak,* 126 F.3d 105, 111 (2d Cir. 1997); *United States v. Vebeliunas, 76 F.3d 1283, 1290 (2d Cir. 1966)* "Constructive amendments 'are per se violations of the Fifth Amendment that require reversal even without a showing of prejudice to the defendant;'" *United States v. Clemente, supra. at 482 (2d Cir. 1994).*

In fact, in *United States v. Thomas, 274 F.3d 655, 670-672 (2d. Cir 2001),* the Second Circuit fundamentally put constructive amendment error into the category of "structural error." That is to say, that in *Thomas* the Court analyzed constructive amendment error against the template of the four part "plain error" test established in *United States v. Olano,* 507 U.S. 725 (1993). The Court explained that if the trial proof showed that a constructive amendment of the indictment had occurred, that given the nature of the rights that would necessarily be violated thereby, such error would always satisfy

all parts of the *Olano* plain error standard.

As the Court explained, a "constructive amendment," unquestionably met the first two requirements of *Olano* (i.e.; [1] that there was "error," and [2] that the error was "plain"). The Court next assessed whether a constructive amendment satisfied the third prong of Olano; that is, did the error "affect [the] substantial rights,"of the defendant. In this regard the Court noted: "[W]e conclude that the error in this case is more akin to a constructive amendment than a variance. As we observe above, an error resulting in a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment is per se prejudicial. See, *Delano, 55 F.3d at 729.* Thus, if we regard the error in this case as a conviction of the defendant of an offense other than the offense with which he was charged in the indictment, then we are led to the conclusion that the error in this case was prejudicial per se." (Id, at 671)

Finally, having concluding that a constructive amendment error satisfied the first three requirements of *Olano*, the *Thomas* Court lastly considered whether such an error necessarily met the forth and last requirement of the plain error test. In this regard, the Court began its analysis noting that: "Because Olano's fourth prong is phrased in the disjunctive, we may exercise our discretion to notice the plain error if we conclude that the error in this case 'seriously affected' the fairness or the integrity or the public reputation of judicial proceedings" (*Id.* at 671). The Court found that the error clearly satisfied either standard. With respect to the effect of the error on the "fairness or the integrity or the public reputation of judicial proceedings," the Court held:

> For similar reasons, we also conclude that a refusal to notice the error in this case would seriously affect the public reputation of judicial proceedings. As discussed above, the error in this case can be seen as an error in

> sentencing--i.e., as the District Court imposing a sentence that it had no actual authority to impose. **It can also be seen as an error in the conviction--i.e., as the conviction of a defendant for a crime different than the crime charged in the indictment and for which an element that the defendant was demonstrably prepared to contest was decided by the judge by a preponderance-of-the-evidence standard rather than by a jury beyond a reasonable doubt. In either case, permitting the error to stand would damage the judicial system's public reputation for fairness.** (emphasis supplied. Id. at 671)

Self-evidently, the Court's decision in *Thomas* cannot be squared with the decision in this case. The Court in *Thomas* reached the conclusion that constructive amendment error would always satisfy the four prongs of *Olano*, on the basis of, *inter alia*, the Circuit's long standing "rule that a constructive amendment is per se prejudicial [a rule which] is grounded in the recognition that 'the very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge... Thus, if we regard the error in this case as conviction of the defendant of an offense other than the offense with which he was charged in the indictment, then we are led to the conclusion that the error in this case was prejudicial per se." (*Id.* at 671-672)

It is important to emphasize too, that the *Thomas* Court found that it was the deprivation of a defendant's rights, guaranteed by the grand jury clause of the Fifth Amendment, which compelled the conclusion that plain error had occurred - and not some factually driven circumstance that might vary from case to case. Having reached this conclusion, it is fair to extrapolate that whenever a constructive amendment is found - since under the analysis in *Thomas* such error will always

satisfy the plain error requirements of Olano - *a fortiori*, such error must be the equivalent of, if not in fact, "structural error."

Accordingly, because the actions by the Second Circuit Court of Appeals in this case represent a wholesale departure from the accepted and usual course of judicial proceedings, a writ of certiorari should issue to review the decision of that Court.

Another compelling reason why this Court should agree to hear this case, is because there is a real need to settle the law among the circuit courts of appeals - which at present is decidedly unsettled - with respect to how constructive amendment error is to be treated. And subsumed with this overarching issue, the Court further needs to explain how the plain error and structural error standards of *Olano* and Johnson respectively, apply to constructive amendment error. Finally, this Court needs as to resolve the confusion which has grown up, in at least two circuit courts of appeals, as to the impact that the Court's recent decision in *United States v. Cotton*, 535 U.S. 625 (2002) has had upon the analysis of constructive amendment error.

It is most respectfully asserted that this Court should take the occasion, through this case, to announce the rule that the constructive amendment of an indictment - caused by the proffer and receipt of evidence beyond that justified by the charges laid in the indictment returned by the grand jury - constitutes "structural error."

As the Second Circuit did in *Thomas*, many circuit courts of appeals, faced with a constructive amendment claim (and having once worked through the *Olano* plain error analysis methodology) have similarly reached the conclusion that because of the nature of the error that occurs when an indictment is constructively amended by the trial proof, reversal of the conviction is constitutionally mandated. If constructive amendment error, *simplicitur*, will always satisfy the four elements of *Olano,* then it must be error in the category of

"structural error."

Most circuit courts of appeals treat a constructive amendment as error *per se*, even when it has not been preserved below. See, *United States v. Fisher, 3 F.3d 456, 463 (1st Cir 1993)* "A constructive amendment is considered prejudicial per se and grounds for reversal of a conviction;" *United States v. Mollica, supra. at 729 (2d Cir. 1988)* "A constructive amendment of an indictment is a per se violation of the Grand Jury Clause of the Fifth Amendment 'that requires reversal even without a showing of prejudice to the defendant;'" *United States v. Jett, 18 Fed. Appx. 224; 2001 U.S. App. LEXIS 20578 (4th Cir. 2001)* "A constructive amendment occurs 'when the Government, through its presentation of evidence and/or its argument, or the district court, through its instructions to the jury, or both, broadens the bases for conviction beyond those charged in the indictment... A constructive amendment is a structural error not subject to review for harmlessness.'" See, *United States v. Floresca, 38 F.3d 706, 712 (4th Cir. 1994)* (en banc); (5th); *United States v. Chilingirian, 280 F.3d 704, 712 (6th Cir. 2002)* "A constructive amendment, on the other hand, is 'a variance that is accorded the per se prejudicial treatment of an amendment,' because, like an actual amendment, it infringes upon the Fifth Amendment's grand jury guarantee... Consequently, a constructive amendment warrants reversal of a conviction;"*United States v. Prentiss, 256 F.3d 971, 992 (10 Cir. 2001)* (Henry, J., dissenting, as to Part III) "This circuit's decisions prohibiting the constructive amendment of indictments provide additional support for this view... it has been the rule that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself. We also stated that 'any such amendment effected by the court's instructions would constitute plain error and be reversible per se.' (citations omitted) 'A variance that expands the indictment is considered a constructive amendment and is per se reversible error...' 'A constructive

amendment that broadens an indictment is reversible error per se, because only the grand jury can amend an indictment.' Where an indictment has been constructively amended, we have found reversible error, and we 'conclusively presume that the defendant has been prejudiced by the constructive amendment;'" *United States v. Descent, 292 F.3d 703, 706 (11th Cir 2002)* "A constructive amendment to the indictment is reversible error per se."

The Third, Seventh and Ninth Circuits take a somewhat different view however. In the Third Circuit, with respect to the third requirement of *Olano* - that is, did the error effect the defendant's "substantial rights" (was he prejudiced) - the Third Circuit "presumes" that any constructive amendment prejudices a defendant sufficiently to satisfy the third prong of *Olano*, but deems such presumption to be "rebutable." As the Court explained in its decision in *United States v. Syme, 276 F.3d 13, 155-156 (3rd Cir. 2002)*: "Therefore, we will apply in the plain error context a rebuttable presumption that constructive amendments are prejudicial (and thus that they satisfy the third prong of plain error review)...[a]pplying a presumption of prejudice to our plain error review of this constructive amendment, we conclude that the constructive amendment to count 25 affected Syme's substantial rights. Leaving this error uncorrected would seriously affect the fairness and integrity of the proceeding. See *Olano, 507 U.S. at 736.* We will therefore exercise our discretion to vacate Syme's conviction on count 25 of the superseding indictment and remand for a new trial on that count."

The Seventh Circuit has yet a seperate approach. If someone appeals to the Seventh Circuit upon the claim that a unpreserved constructive amendment during the course of the trial below, he must satisfy a different test. In the Seventh Circuit, the obligation is upon the appellant to show, that "but for" the constructive amendment, he would otherwise have been acquitted. As the Court in *United States v. Ackley, 296*

F.3d 603, 606 (7th Cir. 2002) held: "In cases involving constructive amendment of jury instructions as claimed by Ackley, plain error occurs only when the amendment constitutes a mistake so serious that the defendant probably would have been acquitted but for the mistake...Ackley provides no specific support for his assertion that he would have been acquitted but for the alleged constructive amendment...[h]is claim of error fails."

In the Ninth Circuit matters have remained somewhat unsettled after *Olano*. As the Court in *United States v. Pentino, 242 F.3d 1090, 1095 (9th Cir, 2001)* explained: "Prior to *United States v. Olano, 507 U.S. 725, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993),* it was established in this circuit that a constructive amendment required reversal, even under plain error review" Since *Olano* however, the Ninth Circuit has on at least two occasions, considered the issue of whether a defendant had to show, factually, that he was prejudiced by a constructive amendment (to satisfy the third prong of Olano). However on each occasion, having once raised the question, the Court has expressly elected not to decide the issue."In *Shipsey* [*190 F.3d 1081 (9th Cir. 1999)*], we found it unnecessary to resolve whether a constructive amendment of the indictment always requires reversal under plain error review after Olano because we concluded that the defendant had been prejudiced by the constructive amendment." (*Pentino, Id.* at 1095)Thus the law of the Ninth Circuit remains unresolved to date.

In addition to the fact that the circuit courts of appeals are divided on the proper treatment of constructive amendment error from the standpoint of the plain error/structural error analysis, following this Court's decision in *United States v. Cotton, 535 U.S. 625 (2002)*, matters have become even more confused.

Indeed, both the Fifth and Ninth Circuit Court of Appeals now seem to share what is most respectfully asserted to be an erroneous view - that this Court's decision in *Cotton* -

somehow materially changed the state of the law with respect to the way that constructive amendment error must be analized.

For example, in *United States v. Bieganowski, 313 F.3d 264, 286-287 (5th Cir. 2002)* the Fifth Circuit advanced the notion that because *Cotton* held that defects in an indictment are not truly "jurisdictional defects," that constructive amendment error is no longer *per se* reversible error.

Most respectfully, the Fifth Circuit's reasoning is not correct. While this Court in *Cotton* (as several courts of appeals before it had already done), expressly dispelled previous notions that a federal court lacked "jurisdiction" if there were material defects in an indictment ("Post-Bain cases confirm that defects in an indictment do not deprive a court of its power to adjudicate a case."*Cotton, Id.* at 630),that pronouncement has nothing to do with the fact that if a constructive amendment occurs, the Fifth Amendment Grand Jury Clause is violated.

Nevertheless, as the Fifth Circuit expressed its view in *Bieganowski*: "Lopez also maintains that the district court permitted the Government to constructively amend the indictment... **Since the Supreme Court's decision in United States v. Cotton , however, it is clear that 'defects in an indictment do not deprive a court of its power to adjudicate a case...' A claim of constructive amendment, then, is not the equivalent of a charge of a jurisdictional defect.**" (emphasis supplied) The fact is however, virtually every decision dealing with constructive amendment error has predicated its holding on the impact such error has upon the Fifth Amendment guarantees to indictment by grand jury and due process, as well as the Sixth Amendment right to the effective assistance to counsel - not upon assertions of defective subject matter jurisdiction.

Nevertheless, similar statements were recently made by the Ninth Circuit in its decision in *United States v. Matthews*, ___ *F.3d* ___, *47 Fed. Appx. 456, 462 (9th Cir. 2002)*: "At one point in our circuit, before Cotton and Olano, it was established

that a constructive amendment always warranted reversal. See *United States v. Olson, 925 F.2d 1170, 1175 (9th Cir. 1991)*: "But, as discussed above, *Cotton* conclusively holds that a defendant may forfeit his claim of error regarding a defective indictment if he fails to object, as Matthews did. Under such circumstances, we review for plain error." It is difficult to see how *Cotton* had any real effect upon plain error review of constructive amendment claims as the Ninth suggests however. Well before *Cotton*, virtually all circuits reviewed unpreserved constructive amendment error through a plain error calculus, indeed an appellant had to rely upon Rule 52(b) to get the issue before the appellate court in the first instance. Once again, reversals for constructive error have traditionally had nothing to do with questions relating to federal courts' subject matter jurisdiction.

These cases noted above however serve to reinforce just how disparate is the reasoning and opinions of the various circuit courts of appeals on the issue and treatment of constructive amendment error. For these reasons too, this Court should issue a writ of certiorari in the instant case and finally settle what the nature of constructive amendment error is, and how it must be treated.

CONCLUSION

A Petition for a Writ of Certiorari should be granted in the instant case to review the decision of the Second Circuit Court of Appeals, and upon such review, an Order of this Court should issue, vacating the conviction of the Petitioner upon the grounds that it was obtained in violation, *inter alia*, of the Grand Jury and Due Process Clauses of the Fifth Amendment and of the Sixth Amendment guarantee of the Right To Counsel. And for such other and further relief as this Court may deem just and warranted.

Respectfully submitted,
John W. Mitchell, Esq.
Counsel of Record
600 Third Avenue
New York, New York 10016
(212) 696-9500
Attorney For Petitioner

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